

NTSB Order No. EA-4936

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 16th day of January, 2002

Docket SE-16291

appeal of an emergency order revoking his commercial pilot certificate.² As discussed below, we grant the appeal.

The pertinent facts are as follows. Respondent lives in the small village of Togiak, accessible only by plane, and located approximately 400 air miles from Anchorage, on the remote shores of southwestern Alaska. Mail is delivered only to the Togiak post office, where it is placed into post office boxes. No residents receive home mail delivery. Respondent asserts that he generally checks his post office box about once or twice a week.

On April 2, 2001, the Administrator sent respondent an emergency order of revocation via U.S. Postal Service Express Mail and regular mail.³ The postal service placed a notice in respondent's box on April 4 that an Express Mail package awaited him. When it remained unclaimed, another notice was placed in his box on April 11. On the same day, the postmaster called respondent to let him know that there was an Express Mail package ready for him to pick up. Respondent claims that, due to his work schedule during this period, he was unable to go to the post office during its normal business hours. On Saturday, April 14, 2001, his son picked up respondent's mail and, though by that time the postal service had returned the package as unclaimed,

²Respondent waived the application of emergency procedures and schedule for his appeal.

³The substance of the charges in the revocation order are not relevant to the resolution of the issue before us, which is purely one of procedure. The order alleged violations of sections 91.13(a), 91.155(a), 135.183, 135.203(a)(1), and 135.205(a) of the Federal Aviation Regulations (FAR), 14 C.F.R. Parts 91 and 135.

the copy of the revocation order sent via regular mail was among the contents of the box. After learning of the order, respondent immediately contacted his attorney, who filed a notice of appeal on his behalf on Monday, April 16, 2001.

The Administrator moved to dismiss respondent's appeal as late-filed, contending that the notice of appeal was due 10 days after the revocation order had been served and that, according to 49 U.S.C. § 46103(b) and Administrator v. Corrigan, NTSB Order No. EA-4806 (1999), the service date is the date the order was mailed, or April 2, 2001.⁴ The law judge granted the motion, finding that respondent both filed his notice late and failed to set forth good cause for the tardy filing.

On appeal, respondent asserts that the Administrator may not here rely on the provisions of 49 U.S.C. § 46103(b) because, while the statute states that "[t]he date of service made by certified or registered mail is the date of mailing," it is silent regarding mailing by Express Mail or regular mail. In response, the Administrator argues that Express Mail is the functional equivalent of certified or registered mail and should

⁴49 U.S.C. § 46103, Service of notice, process, and actions (part of Chapter 461, Investigations and Proceedings), states, in pertinent part:

- (b) Service. - (1) Service may be made -
 - (A) by personal service;
 - (B) on a designated agent; or
 - (C) by certified or registered mail to the person to be served or the designated agent of the person.
- (2) The date of service made by certified or registered mail is the date of mailing.

be treated the same for purposes of the statute.⁵

We cannot agree with the Administrator. Unlike Corrigan, where service was accomplished by certified mail, respondent in the instant case received the emergency revocation order by a method other than one specifically enumerated in the statute. As such, the statute does not apply and is not dispositive in determining the date of service. The Board's rules also are not controlling, since the Board's jurisdiction over the case had not yet begun. Rather, we must look to general legal principles, as explained in Administrator v. Hayes, 1 NTSB 1694 (1972), and its progeny.

As a matter of general law, it must be determined whether service was actual or constructive and when it occurred. See Administrator v. Rourke, NTSB Order No. EA-4186 at 5-6 (1994), citing Hayes. Constructive service can be found, depending on the reasons why a certificate holder failed to receive a notice or order, in those situations where the Administrator mails the notice or order to the respondent's address of record, by certified mail, returned unclaimed, or regular mail, not returned to sender. See Rourke at 6; Administrator v. Hamilton, 6 NTSB 394, 396 (1988).

Given the facts of the instant case, it would appear that respondent had constructive notice of the revocation order when the postmaster called on April 11 to inform him that an Express

⁵The Administrator concedes that the emergency order of revocation was served by neither certified nor registered mail.

Mail package was waiting for pickup at the post office. We do not consider the placement of the first notice in the P.O. box on April 4 to be constructive notice, as respondent was not actually placed on notice of anything, since he had been unable to check his P.O. box and was unaware that a package was awaiting him. However, once the postmaster alerted him, it was as if he had retrieved the package notice himself.⁶

Respondent therefore had constructive notice of the revocation order on April 11, 2001. He had 10 days from that date to file his notice of appeal, a deadline that he met by filing his appeal on April 16.⁷

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is granted;
2. The order of the law judge is reversed; and
3. The case is remanded for processing.

CARMODY, Vice Chairman, and HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order. BLAKEY, Chairman, did not participate. Member GOGLIA submitted the following concurring statement:

⁶See generally other constructive notice cases: Administrator v. Myers, 5 NTSB 997 (1986)(Board found constructive service at time letter was accepted, rejecting respondent's argument that 10-day period for filing appeal should be computed from the date he returned from a business trip and opened a certified letter that his wife had accepted at their home); Administrator v. Heinberg, 5 NTSB 917 (1986)(respondent did not have constructive service where the respondent, while at a remote job site, did not receive the notices of certified mail to be claimed at the post office because he did not pick up his mail from the address to which the notices had been sent until after the letter had been returned).

⁷Given the disposition of the case, we need not reach the other issues raised by respondent.

I concur with the decision of the Board that requires the Board to accept Respondent's notice of appeal as timely filed.

I believe that clarification of the Board's rulings in *Administrator v. Myers*, 5 NTSB 997 (1986), and *Administrator v. Edwards*, NTSB Order EA-4378 (1995), is needed because they may be interpreted to require that a Respondent who waives the emergency rules must do so within the 10-day time limit instead of the 20-day period otherwise permitted. In this case the Respondent filed a waiver of emergency procedures and a notice of appeal within the 20-day period. The interests of the Board, the Administrator and the public are promoted by such clarification because it would confirm the Board's commitment to fairness and due process. There is no reason not to seize that opportunity now because the public is not endangered when the Respondent waives emergency rules, and thereby accepts the immediate effectiveness of the Administrator's order pending a hearing on the merits.

In this case, the incident occurred on December 2, 2000. The letter of investigation from the FAA was dated December 15, 2000. The Respondent received the letter of investigation one month later, about January 17, 2001. Respondent responded to the letter and received no other follow-up, neither written nor personal contact or interview. Four months after the date of the alleged dangerous incident, on April 2, 2001, the Administrator mailed an Emergency Order of Revocation to the Respondent by regular mail and also by express mail that arrived on April 4, 2001. Respondent picked up his mail on Saturday, April 14, 2001, and filed a notice of appeal on the next business day, Monday, April 16, 2001, and within a few days filed a waiver of emergency procedures.

There is no reason for the Administrator to use a procedural technicality to cut off a Respondent's right to a hearing on the merits of the case when the Respondent files an appeal within the 20 days provided in section 821.30, and waives the strict time limits imposed upon the Administrator under the emergency rules. A Respondent, who is willing to waive the time limits on the Administrator and accept an interim immediate effectiveness of the proposed action, should routinely be granted the additional 10 days to file an appeal.

In any event, while I concur with the decision of the Board, I would add that the "constructive notice" rationale should not be interpreted to shorten the time for response under the general legal principles on which the Board bases its decision. Although Respondent had what the Board considers to be constructive notice as of April 11, I am concerned because there is no indication in the record that Respondent was notified that he had received an emergency order, or that he had only 10 days to respond. It is unlikely that the Post Master opened the Express Mail package and advised Respondent that it was an Emergency Order of Revocation, or that he had only 10 days to respond. Correspondence from the Administrator more typically proposes a civil penalty, and provides more time for response.

Also, I would not regard as inadequate "good cause" the Respondent's explanation for the delay in picking up his mail that "he was working". We have recent reminders that the ordinary working men and women of this country are the real heroes. The Administrator and other government officials should take no action to denigrate, depreciate or disrespect those who are too busy to rush to the Post Office to collect mail. If the Administrator's interpretation of the "Emergency" nature of this case permits the Administrator to have four months to issue an order, then general legal principles should permit the private citizen a reasonable time to respond.